

RULE 63. INABILITY OF A JUDGE TO PROCEED

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Advisory Committee's Notes 1993

Rule 63 is entirely replaced to adopt a 1991 amendment of Federal Rule 63 for the purpose of maintaining conformity to the federal rule. The reasons for and intended scope of the new rule are those stated in the federal Advisory Committee Note:

* * * * * The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons * * * * *. Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge * * * * *.

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal

Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The “certification” required of the successor judge may be an oral acknowledgement of familiarity made on the record. The federal Advisory Committee’s Note continues:

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F.R. Evid. [and M.R. Evid.] 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. . . .

Reporter's Notes December 1, 1959

This rule, which closely follows Federal Rule 63, is similar to R.S.1954, Chap. 107, Sec. 51 (amended in 1959 so as to apply in criminal cases only) [later 4 M.R.S.A. § 1055, repealed in 1965 following adoption of Maine Criminal Rule 25] which permits another justice to allow exceptions in the event of the disability of the trial justice. The rule specifies that if the justice who is assigned to act for the disabled justice is satisfied that he cannot perform this duty, he may in his discretion grant a new trial. No Maine case has been found covering this situation,

but the rule seems a sensible one. It would obviate at least the possibility of the result that when the trial justice was disabled and the successor was satisfied that he could not act, the aggrieved party would be without any remedy. *Cf. The Stenographer Cases*, 100 Me. 271, 61 A. 782 (1905).